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ORAL EMPLOYMENT CONTRACTS AND EQUITABLE ESTOPPEL: THE REAL ESTATE BROKER AS VICTIM

Keely is a licensed real estate broker.¹ The owner of a parcel of land orally engaged Keely to sell his property for a commission. Keely presented the property to an attorney, Price, who was acting on behalf of a group of buyers. Price made an offer lower than the asking price to which the owner agreed on condition that the buyers pay Keely's commission and Keely release the owner from his obligation. On behalf of the buyers, Price orally promised to pay Keely a commission in return for his services as a broker and also to reduce the contract to writing. Keely contended that Price made these promises with no intention of performance.² In reliance on these representations, Keely performed services and incurred expenses while acting as a broker. Price never reduced his promise to writing, and although the sale of the property was consummated, Keely received no commission.

The above account summarizes the facts as alleged by the plaintiff in a recent California Court of Appeal case, *Keely v. Price*.³ The actions of Price clearly come within California's statutory definition of actual fraud:

Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: . . .

4. A promise made without any intention of performing it . . .⁴

Nevertheless when Keely, the broker, sued for his commission on the oral contract, the trial court upheld a demurrer to the entire complaint based on the statute of frauds.⁵ The court of appeal upheld the demurrer as to causes of action in breach of contract and in fraud, ruling that equitable estoppel was unavailable to prevent the use of the statute of frauds.⁶

1. See *Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972).

2. Actual fraud on the part of Price was never proven but was accepted as true for the purpose of sustaining a demurrer.

3. 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972).

4. CAL. CIV. CODE § 1572(4) (West 1954).

5. 27 Cal. App. 3d at 210-11, 103 Cal. Rptr. at 532.

6. *Id.* at 214, 103 Cal. Rptr. at 535. The court allowed a third cause of action based on tortious interference, which permitted the plaintiff to take discovery and pos-

Similar cases of fraud are far from unusual in the California real estate business. Thousands of dollars in earned commissions are lost each year owing to the prevailing belief among attorneys and courts that the statute of frauds is an absolute bar to recovery for a broker's services on an oral contract to sell real estate. Such belief is encouraged by standard reference works on California real estate law.⁷

The courts have based the denial of equitable estoppel to real estate brokers on two grounds. First, they explain, since real estate transactions are particularly susceptible to fraudulent claims for services, public policy requires that the statute of frauds be rigidly enforced.⁸ Second, they reason, a broker has no right to rely on an oral contract of employment since he knows that such a contract must be in writing.⁹ While this reasoning may still be somewhat persuasive, its soundness should be reassessed, as the broker's position in relation to the public has changed considerably since the enactment of the statute of frauds provision concerning brokers' employment contracts. The balance of the equities may have shifted since 1878 owing to greater public control over the broker and a change in the practicalities of the real estate business.¹⁰

The purpose of this note is twofold: first, to show that the court in *Keely* misinterpreted the law in denying a defrauded broker the use of the doctrine of equitable estoppel against a buyer's assertion of the statute of frauds in a suit for breach of an oral employment contract; second, to argue that allowing the broker a cause of action through the use of estoppel would be fair. The discussion will commence with a brief treatment of the historical development of the statute of frauds and an explanation of the three types of fraud that may be perpetrated against a broker. Next, the development of the California doctrine of estoppel to assert the statute of frauds will be traced by reference to California Supreme Court and legislative pronouncements as to its proper use. Inquiry will then be directed toward supreme and appellate court decisions concerning the use of estoppel against the particular subsection of the statute of frauds which requires that a contract for services in selling or leasing real estate be in writing. The discussion will conclude with an examination of the equities of the broker's case.

sibly to uncover some written memorandum of the contract sufficient to satisfy the statute of frauds. *Id.* at 216, 103 Cal. Rptr. at 535.

7. See 1 H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE 220-21 (1965); STATE BAR OF CALIFORNIA, CALIFORNIA REAL ESTATE SALES TRANSACTIONS §§ 5.6-9 (1967).

8. See cases cited note 128 *infra*.

9. See cases cited note 129 *infra*.

10. See text accompanying notes 128-42 *infra*.

Estoppel To Assert the Statute of Frauds: The Context

The Statute of Frauds

The first statute of frauds was enacted in 1676 to prevent "many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury."¹¹ The statute required that certain contracts be in writing to be enforceable.

The California statute of frauds was first enacted in 1872.¹² A provision relating to real estate brokers was added in 1878.¹³ This provision was amended in 1963¹⁴ and 1967¹⁵ to read as follows:

The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

. . . .

5. An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where such lease is for a longer period than one year, for compensation or a commission¹⁶

For convenience, this provision will hereinafter be referred to as subsection 5.

Types of Fraud

To clarify discussion of the possible applications of equitable estoppel, it is essential first to distinguish clearly among three types of fraud: actual fraud, unjust enrichment, and unconscionable injury. Actual fraud, sometimes called intentional, legal or promissory fraud, occurs when one party enters into a contract without any intention of performing it.¹⁷ In the context of real estate transactions, this type of fraud would result if a broker's employer intended to cheat the broker out of his commission. Such is the case when the owner of real estate orally promises to pay a commission in order to induce a broker to render services but has no intention of honoring the promise. *Keely v. Price*¹⁸ is an example of actual fraud.

The other two types of fraud are resulting frauds. In the termi-

11. Act for Prevention of Frauds and Perjuries, 29 Car. 2, c. 3 (1676).

12. CAL. CIV. CODE § 1624 (West 1973) (enacted 1872).

13. Acts Amendatory of the Civil Code, Cal. Stat. 1877-78, ch. 165, § 1, at 86.

14. Cal. Stat. 1963, ch. 814, § 1, at 1843.

15. Cal. Stat. 1967, ch. 52, § 1, at 953.

16. CAL. CIV. CODE § 1624(5) (West 1973).

17. See text accompanying note 4 *supra*.

18. 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972).

nology of *Monarco v. Lo Greco*,¹⁹ to be discussed shortly,²⁰ such fraud inheres in the result of the transaction. The first type, unjust enrichment, results when one party to an oral contract receives benefits under the contract but avoids his own performance by asserting the statute of frauds.²¹ For a finding of unjust enrichment, a transaction must be analyzed from the employer's point of view. Unjust enrichment works a fraud upon a broker if his employer is enriched owing to the uncompensated services of the broker. Such fraud can occur when an oral contract to sell real estate is consummated through the broker's efforts. By asserting the statute of frauds, the owner may enjoy the fruits of the broker's labor but pay nothing.

The other type of resulting fraud, unconscionable injury, is present when one party to a contract has been induced by the other seriously to change his position in reliance on the contract but through operation of the statute of frauds²² does not receive the benefit of his bargain. An inquiry concerning unconscionable injury focuses on the broker's side of the transaction. A broker is unconscionably injured when he has expended a great deal of effort in reliance upon an oral promise of a commission but is never paid. The determinative factor here is not the consummation of a sale, as in the case of unjust enrichment, but the reasonable reliance of the broker in working to procure a ready, willing and able buyer.

All three types of fraud will be discussed in detail,²³ and the distinctions should be kept in mind. It should also be noted, however, that all three types may be present in one transaction. Such is the case in *Keely v. Price*. Not only did the owner commit actual fraud, but he was unjustly enriched, as he enjoyed without cost the result of the broker's efforts. The broker was also unconscionably injured, as he performed his part of the oral bargain in reasonable reliance upon the owner's promise of a commission but was never paid.

Early Development of Equitable Estoppel

Since the purpose of the statute of frauds is to prevent fraud, courts soon recognized that equity should prevent the use of the statute to perpetrate a fraud.²⁴ The doctrine of equitable estoppel was applied to prevent a defendant from asserting the statute as a defense to an oral contract when to do so would work a fraud upon the plaintiff.

19. 35 Cal. 2d 621, 623, 220 P.2d 737, 739 (1950).

20. See text accompanying notes 31-37 *infra*.

21. 35 Cal. 2d at 623-24, 220 P.2d at 740.

22. *Id.* at 623, 220 P.2d at 739.

23. See text accompanying notes 26-36 *infra*.

24. See Comment, *Equitable Estoppel and the Statute of Frauds in California*, 55 CALIF. L. REV. 590, 595 (1965) [hereinafter cited as *Equitable Estoppel*].

Actual fraud was the first type of fraud to be recognized as a ground for estoppel.²⁵ In a case in which a defendant intended to deceive a plaintiff by inducing a one-sided performance of the bargain, an equity court would enforce the oral contract despite the statute of frauds.²⁶ Whether or not such a practice is technically an equitable estoppel is immaterial:

It cannot be questioned that legal fraud creates an estoppel against the Statute of Frauds. On theory this would seem rather needless as fraud in itself is a sufficient reply against the plea of the statute without resort to estoppel, but practically it does no harm.²⁷

The doctrine of equitable estoppel is more useful, however, in cases of resulting fraud.²⁸ The historical development of this principle has been extensively treated elsewhere.²⁹ For purposes of the present discussion, examination of the current California doctrine is sufficient.

California Supreme Court

The modern version of the doctrine of equitable estoppel was announced and explained in a 1950 California Supreme Court case, *Monarco v. Lo Greco*.³⁰ In *Monarco*, Christie Castiglia was orally promised by his mother and stepfather that if he stayed and worked on the family farm, the parents would keep it in joint tenancy, and the survivor would devise to him the bulk of the farm. In reliance on this oral promise, Christie remained on the farm and worked diligently, giving up any opportunity to get an education or to accumulate his own property. He received only room and board and spending money. When the stepfather died, he left all of his property to a grandson. Nevertheless, the California Supreme Court enforced the oral contract between Christie and his parents, holding the grandson estopped to assert the statute of frauds.³¹

The importance of *Monarco* is to be found in the rules enunciated for the use of equitable estoppel:

The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that

25. See Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440, 446 (1931) [hereinafter cited as Summers].

26. *Id.* at 444.

27. *Id.* at 452 (footnote omitted).

28. See *id.* at 446. See also *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737 (1950).

29. See generally *Equitable Estoppel*, *supra* note 24, at 590; Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951).

30. 35 Cal. 2d 621, 220 P.2d 737 (1950).

31. *Id.* at 627, 220 P.2d at 742.

would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract, or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute.³²

This language clearly states that an equitable estoppel may be justified by the application of either of two tests. The first test looks to the plaintiff and finds estoppel appropriate if he has suffered an unconscionable injury due to a serious change of position in reliance on the oral contract; the second considers possible unjust enrichment of the defendant. Subsequent cases have recognized that these two tests are separate.³³

Although unjust enrichment and unconscionable injury are independent grounds on which to base an equitable estoppel, the California courts rarely find an estoppel based solely on unjust enrichment. There are two reasons for this result. First, a single set of facts often reveals both unjust enrichment and unconscionable injury.³⁴ If the defendant is unjustly enriched at the expense of the plaintiff, the plaintiff will normally suffer unconscionable injury due to his expenditures of time and money in reliance on the defendant's oral promise to pay a commission. Second, a court will not allow an equitable estoppel based on unjust enrichment if quantum meruit is an adequate remedy.³⁵ The theory of quantum meruit allows a plaintiff to recover the reasonable value of services rendered where the contract under which he performed is for some reason unenforceable. However, despite these two reasons, there would seem to be no justification, given the proper facts, for a court's refusal to find an equitable estoppel based on unjust enrichment alone. This point will be explored later.³⁶

Monarco also clarifies the use of the unconscionable injury test. The opinion explains the type of oral promises or representations upon

32. *Id.* at 623-24, 220 P.2d at 739-40 (citations omitted).

33. See, e.g., *Redke v. Silvertrust*, 6 Cal. 3d 94, 490 P.2d 805, 98 Cal. Rptr. 293 (1971); *Estate of Baglione*, 65 Cal. 2d 192, 417 P.2d 683, 53 Cal. Rptr. 139 (1966); *Day v. Greene*, 59 Cal. 2d 404, 380 P.2d 385, 29 Cal. Rptr. 785 (1963); see also Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170 (1967).

34. See, e.g., *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737 (1950); *Notten v. Mensing*, 3 Cal. 2d 469, 45 P.2d 198 (1935); *Ryan v. Welte*, 87 Cal. App. 2d 897, 198 P.2d 357 (1948).

35. *Monarco v. Lo Greco*, 35 Cal. 2d 621, 625, 220 P.2d 737, 740 (1950). "Those cases, however, that have refused to find an estoppel have been cases where the court found either that no unconscionable injury would result from refusing to enforce the oral contract or that the remedy of quantum meruit for services rendered was adequate." *Id.* (citations omitted); see *Ruinello v. Murray*, 36 Cal. 2d 687, 227 P.2d 251 (1951); cf. *Tompkins v. Hoge*, 114 Cal. App. 2d 257, 250 P.2d 174 (1952).

36. See text accompanying notes 59-63, 93-97 *infra*.

which a plaintiff has a right to rely in performing services. The case lays to rest the belief that the estoppel can be based only on representations of the defendant concerning the application of the statute of frauds itself. No such representations are in fact required:

In reality it is not the representation that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it. Moreover, a party who has accepted the benefits of an oral contract will be unjustly enriched if the contract is not enforced whether his representations related to the requirements of the statute or were limited to affirmation that the contract would be performed.³⁷

Legislative Intent

Though the *Monarco* reasoning is not limited to any particular class of contracts governed by the statute of frauds, the California courts have consistently denied the application of equitable estoppel to subsection 5.³⁸ This result can be neither explained by the language of the statute nor justified by the early case law development of the doctrine of equitable estoppel.

When the California Legislature enacted the first statute of frauds in 1872, it also enacted Civil Code section 1623, which codified the prevailing equitable rule limiting the use of the statute of frauds:

Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party.³⁹

When the statute of frauds provision relating to contracts for services in the sale of real estate was added in 1878, Civil Code section 1623 was still in effect, modifying the use of the entire statute of frauds. Though the legislature seems to have codified the prevailing principle of equitable estoppel in 1872,⁴⁰ principles of equity did not remain static. Subsequent cases extended the principle of equitable estoppel from a situation in which the defrauded party was led to believe the contract was in writing, to cases in which the representation was that a writing would be executed in the future,⁴¹ that a writing would be

37. 35 Cal. 2d at 626, 220 P.2d at 741.

38. See cases cited notes 68, 77 *infra*. But see *Le Blond v. Wolfe*, 83 Cal. App. 2d 282, 188 P.2d 278 (1948).

39. CAL. CIV. CODE § 1623 (West 1973) (enacted 1872). This California statute was based on and exactly duplicated the then existing New York law. See 2 J. STORY, EQUITY JURISPRUDENCE § 768, at 92-94 (6th ed. 1853).

40. See generally *Summers*, *supra* note 25, at 443-49. Actual fraud has always been a basis for equitable relief. *Id.* at 446.

41. *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88 (1909).

legally unnecessary,⁴² or that the statute would not be relied upon as a defense.⁴³ In none of these cases did the court restrict the use of estoppel to any particular subsection(s) of the statute of frauds. In a landmark case applying equitable estoppel because of a representation that a contract would be reduced to writing in the future, the court said:

We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present⁴⁴

In summary, then, it seems that at no time up to and including the decision in *Monarco* did the California Legislature ever indicate an intent to restrict the use of equitable estoppel to any class of contracts within the statute of frauds. Nor have any supreme court decisions interpreting and expanding the doctrine of equitable estoppel imposed such a restriction. Nonetheless, only one California case has ever allowed the application of that doctrine to subsection 5.⁴⁵ Why is there such hostility to real estate brokers? Is there any equitable reason for treating subsection 5 agreements differently from those covered by the other nine subsections? The only way to answer these questions is to examine California decisions in which a broker suing on an oral employment contract has pleaded equitable estoppel to assert subsection 5.

Estoppel To Assert Subsection Five

Supreme Court Decisions

The California Supreme Court has never categorically denied the use of equitable estoppel to assert subsection 5. On the contrary, the court in recent decisions has seemed to imply that, given the proper facts, estoppel would be a proper remedy for a real estate broker.⁴⁶ The court has mentioned the *Monarco* case twice in cases involving a broker's suit for a commission earned on an oral contract of employment.⁴⁷ These recent decisions may be most profitably examined fol-

42. *Fleming v. Dolfin*, 214 Cal. 269, 4 P.2d 776 (1931).

43. *Vierra v. Pereira*, 12 Cal. 2d 629, 86 P.2d 816 (1939). See generally *Equitable Estoppel*, *supra* note 24, at 595.

44. *Seymour v. Oelrichs*, 156 Cal. 782, 795, 106 P. 88, 94 (1909).

45. *Le Blond v. Wolfe*, 83 Cal. App. 2d 282, 188 P.2d 278 (1948). See text accompanying notes 71-72 *infra*.

46. See *Beazell v. Schrader*, 59 Cal. 2d 577, 381 P.2d 390, 30 Cal. Rptr. 534 (1963); *Franklin v. Hansen*, 59 Cal. 2d 570, 381 P.2d 386, 30 Cal. Rptr. 530 (1963); *Pacific S.W. Dev. Corp. v. Western Pac. R.R.*, 47 Cal. 2d 62, 301 P.2d 825 (1956).

47. See *Franklin v. Hansen*, 59 Cal. 2d 570, 577, 381 P.2d 386, 390, 30 Cal. Rptr. 530, 534 (1963); *Pacific S.W. Dev. Corp. v. Western Pac. R.R.*, 47 Cal. 2d 62, 70, 301 P.2d 825, 830 (1956).

lowing a brief overview of pre-*Monarco* decisions concerning the use of subsection 5.

In cases arising before *Seymour v. Oelrichs*,⁴⁸ a 1909 decision, the supreme court applied subsection 5 strictly, giving little consideration to the equities in each case. In every case in which a broker sued for his commission on an oral employment contract, the court held that subsection 5 barred recovery whether in contract⁴⁹ or in quantum meruit.⁵⁰ In none of these cases did the court consider the application of an equitable estoppel.

*Jamison v. Hyde*⁵¹ is a good example of the harsh application of this rule. The defendant, in his answer, admitted making an oral contract but also pleaded the statute of frauds as a defense. The court allowed the defendant to amend his pleadings to omit any admission as to an oral contract. The plaintiff was denied relief both in contract and in quantum meruit.

*Seymour v. Oelrichs*⁵² marks the beginning of a concern for the equitable use of the statute of frauds. This decision contains an extensive discussion of equitable estoppel and concludes that it is not limited to any particular class of contracts within the statute. Five years later, *Smith v. Post*⁵³ held that since the written contract had expired, the broker was barred by the statute of frauds from recovering a commission, even though the subsequent sale approximated the terms of the contract and the broker was instrumental in making the sale. Estoppel was not discussed. Nevertheless, the court took care in considering the equities of the case, holding that owing to special circumstances, the result was not inequitable.⁵⁴

In *Smith v. Frans Nelson & Sons, Inc.*,⁵⁵ the court once again demonstrated its concern with doing equity in a suit involving a broker's

48. 156 Cal. 782, 106 P. 88 (1909).

49. See *Hicks v. Post*, 154 Cal. 22, 96 P. 878 (1908); *Jamison v. Hyde*, 141 Cal. 109, 74 P. 695 (1903); *Shanklin v. Hall*, 100 Cal. 26, 34 P. 636 (1893); *Zeimer v. Antisell*, 75 Cal. 509, 17 P. 642 (1888); *McCarthy v. Loupe*, 62 Cal. 299 (1882).

50. See *Jamison v. Hyde*, 141 Cal. 109, 74 P. 695 (1903); *McGeary v. Satchwell*, 129 Cal. 389, 62 P. 58 (1900); *McPhail v. Buell*, 87 Cal. 115, 25 P. 266 (1890); *Myres v. Surryhne*, 67 Cal. 657, 8 P. 523 (1885); *McCarthy v. Loupe*, 62 Cal. 299 (1882). These cases were based upon then subsection 6, which was renumbered subsection 5 in 1931.

51. 141 Cal. 109, 74 P. 695 (1903).

52. 156 Cal. 782, 106 P. 88 (1909). This case did not involve a broker's contract but did involve an employment contract. The plaintiff was a captain of detectives in the San Francisco Police Department. He left his secure job in reliance on an oral contract of employment for ten years. He was also promised that the contract would be put in writing, but it was not.

53. 167 Cal. 69, 138 P. 705 (1914).

54. *Id.* at 77, 138 P. at 708.

55. 214 Cal. 295, 5 P.2d 427 (1931).

commission earned on an oral contract. The statute of frauds was satisfied by the seller's statement in the escrow agreement that the broker would be paid a specific amount on completion of the escrow transaction. Escrow was never closed, but the broker alleged that his oral employment contract contained no such condition prerequisite to recovery. The court ruled that the broker was limited to the conditions of employment specified in the escrow agreement, but suggested that such limitations in an escrow agreement could be "[o]vercome by some direct attack in equity"⁵⁶

In 1950, the supreme court in *Monarco* indicated its still deepening concern over improper use of the statute of frauds by articulating broad equitable rules for the application of estoppel.⁵⁷ Since that decision, the court has had three occasions to consider a broker's suit to recover a commission on an oral contract of employment.⁵⁸ None of these cases found an estoppel. It seems, however, that this result is not due to a rejection of equitable estoppel in a subsection 5 situation, as none of the cases provided an adequate factual basis for the application of estoppel.

*Pacific Southwest Development Corp. v. Western Pacific Railroad Co.*⁵⁹ is often cited as requiring a strict application of subsection 5.⁶⁰ Such a conclusion is not supported by the decision. The broker sued for a 5 percent commission earned under an oral contract to procure an option to purchase land. The equitable position of the broker was weak, for his negotiations with the seller did not directly result in a sale. Furthermore, even though the actual option to buy was negotiated directly by the buyer, he still paid a 2½ percent broker's fee. These facts did not support an estoppel:

The fact that plaintiff rendered services and conducted unsuccessful negotiations with Lenfest [the seller] does not constitute a change of position to plaintiff's detriment, nor does the fact that defendant refused to pay plaintiff a real estate commission upon an option which defendant later procured through direct negotiations with Lenfest constitute an unjust enrichment within the meaning of the estoppel doctrine.⁶¹

The court was careful to add that no circumstances of actual fraud had been shown.

Justice Carter, dissenting,⁶² would have allowed an estoppel based

56. *Id.*

57. See text accompanying notes 31-37 *supra*.

58. See cases cited note 46 *supra*.

59. 47 Cal. 2d 62, 301 P.2d 825 (1956).

60. *E.g.*, *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966); *King v. Tilden Park Estates*, 156 Cal. App. 2d 824, 320 P.2d 109 (1958).

61. 47 Cal. 2d at 70, 301 P.2d at 830-31.

62. *Id.* at 73, 74-75, 301 P.2d at 833.

on *Monarco*. His opinion was provoked by a disagreement not as to the law but rather as to the amount of enrichment the defendant received through the broker's efforts. Carter believed that the efforts of the broker, while not involved in securing the final agreement of sale, had so contributed to the negotiations as to make the option purchase possible: "Defendant was unjustly enriched by the acceptance of those services (he obtained the option) for which he refused to pay."⁶³

Carter's reasoning as to the application of the unjust enrichment test seems more persuasive than the majority argument since the transaction was completed with the help of the broker. Nevertheless, as the equities in this case seem evenly balanced, the majority could understandably conclude that the broker's efforts had not been a material benefit to the defendant.

The only cases since the 1956 decision in *Pacific* in which the California Supreme Court has considered a broker's suit on an oral employment contract are *Beazell v. Schrader*⁶⁴ and *Franklin v. Hansen*,⁶⁵ both decided on May 14, 1963. *Beazell* contains no reference to estoppel. The broker sued for a 5 percent commission on an oral contract to sell an apartment building for \$200,000. After due performance by the broker, the seller signed an escrow instruction providing for a broker's commission of only \$2,500. The broker was limited to the amount in the escrow agreement through operation of the statute of frauds. Nonetheless, the court explained: "The complaint fails to charge defendant with any improprieties other than his failure to perform the oral contract."⁶⁶ In other words, the broker did not plead facts sufficient for equitable relief.

The plaintiff in *Franklin* also failed to allege fraud. The broker sued for a commission of 5 percent on the sale of a house. The broker procured a ready, willing and able buyer, but the seller backed out of the agreement. The court found for the seller on the basis of the statute of frauds. Although these facts could not support an estoppel due to unjust enrichment, as the sale was never consummated, they seem to provide a classic example of a detrimental change in position due to reliance on an oral contract. The broker, however, missed his chance to argue estoppel: "Plaintiff herein has neither alleged nor urged the application of an equitable estoppel"⁶⁷ This statement appears to wave a red flag inviting an argument of estoppel. The

63. *Id.* at 74, 301 P.2d at 833.

64. 59 Cal. 2d 577, 381 P.2d 390, 30 Cal. Rptr. 534 (1963).

65. 59 Cal. 2d 570, 381 P.2d 386, 30 Cal. Rptr. 530 (1963).

66. 59 Cal. 2d at 582, 381 P.2d at 393, 30 Cal. Rptr. at 537.

67. 59 Cal. 2d at 576-77, 381 P.2d at 390, 30 Cal. Rptr. at 534, citing *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737 (1950).

supreme court seems only to be waiting for the right case and the proper pleadings to invoke an estoppel to assert subsection 5.

Court of Appeal Decisions

Since common law principles of equity, California legislative history, and California Supreme Court decisions present no barriers to a finding of estoppel to assert subsection 5, how did the court reach its decision in *Keely*? The answer would seem to lie in an increasing indifference to equity and a pyramid of misinterpretation of law by the California Courts of Appeal. This severe conclusion is supported by a review of court of appeal cases applying subsection 5.

Prior to *Monarco*, the appellate courts had frequent opportunity to consider brokers' suits on oral contracts of employment. With only one exception, the courts denied any relief to the broker, whether in contract,⁶⁸ in quantum meruit,⁶⁹ or in tort.⁷⁰ The single case allowing recovery was *Le Blond v. Wolfe*.⁷¹ In that case the broker released the seller from a written promise to pay a commission in return for an oral promise from the buyer to pay the commission. The buyer was estopped to assert subsection 5 because of the broker's detrimental reliance in releasing the written contract.⁷² This case has never been extended beyond its facts.⁷³

A particularly good example of the harsh application of subsection 5 during this time is *Colburn v. Sessin*.⁷⁴ Decided one year after *Le Blond*, the court refused to find an estoppel. The broker was told by the seller-defendant that he would be paid a 5 percent commission on the sale of some real estate and that a written memorandum would be executed. Relying on the seller's promise to pay, the broker found a

68. See *Colburn v. Sessin*, 94 Cal. App. 2d 4, 209 P.2d 989 (1949); *Herzog v. Blatt*, 80 Cal. App. 2d 340, 180 P.2d 30 (1947); *White v. Hirschman*, 54 Cal. App. 2d 573, 129 P.2d 430 (1942); *Sweeley v. Gordon*, 47 Cal. App. 2d 381, 118 P.2d 14 (1941); *Egan v. Pacific S.W. Trust & Sav. Bank*, 92 Cal. App. 1, 267 P. 719 (1928); *Kornman v. Nelson*, 83 Cal. App. 616, 257 P. 150 (1927); *Holland v. Flash*, 20 Cal. App. 686, 130 P. 32 (1912); *Proulx v. Sacramento Valley Land Co.*, 19 Cal. App. 529, 126 P. 509 (1912).

69. See *Ford v. Palisades Corp.*, 101 Cal. App. 2d 491, 225 P.2d 545 (1950); *Blanchard v. Huthsing*, 97 Cal. App. 2d 234, 217 P.2d 476 (1950); *White v. Hirschman*, 54 Cal. App. 2d 573, 129 P.2d 430 (1942); *Edgecomb v. Callahan*, 132 Cal. App. 248, 22 P.2d 521 (1933); *Gould v. Otto*, 81 Cal. App. 409, 254 P. 272 (1927); *Holland v. Flash*, 20 Cal. App. 686, 130 P. 32 (1912); *Proulx v. Sacramento Valley Land Co.*, 19 Cal. App. 529, 126 P. 509 (1912).

70. See *Kroger v. Baur*, 46 Cal. App. 2d 801, 117 P.2d 50 (1941). See generally *Sanders*, Book Review, 36 CALIF. L. REV. 138 (1948).

71. 83 Cal. App. 2d 282, 188 P.2d 278 (1948).

72. *Id.* at 287, 188 P.2d at 281.

73. See, e.g., *Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972).

74. 94 Cal. App. 2d 4, 209 P.2d 989 (1949).

buyer, who also orally promised that a commission would be paid. Both requested an introduction pending the writing of the contract. After the buyer and seller were introduced, they refused to pay the broker, asserting subsection 5. The court distinguished *Le Blond* since the broker in *Colburn* did not release a written contract and refused to find an estoppel. The most troublesome aspect of the case is that the complaint contained an allegation, accepted as true on demurrer, that the promises were made with no intention of performance.⁷⁵ As stated previously, actual fraud, if proved, is clearly sufficient for the granting of equitable relief.⁷⁶

Even after *Monarco*, the appellate courts continued to deny relief to brokers, whether in contract⁷⁷ or in quantum meruit.⁷⁸ Six of these cases have considered the doctrine of estoppel as applied to subsection 5.⁷⁹ One decision contains no reasoning as to the use of estoppel and is not helpful.⁸⁰ The remaining cases provide extensive discussion of equitable estoppel and are generally relied upon as precluding the use of the doctrine against subsection 5.⁸¹ Each case merits scrutiny as to the application of law and equity to the facts.

The cases of *Augustine v. Trucco*⁸² and *King v. Tilden Park Estates*⁸³ can best be considered together, as they offer almost identical

75. *Id.* at 5, 209 P.2d at 990.

76. See Summers, *supra* note 25.

77. See *Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972); *Osborne v. Huntington Beach Union High School Dist.*, 5 Cal. App. 3d 510, 85 Cal. Rptr. 793 (1970); *Paulsen v. Leadbetter*, 267 Cal. App. 2d 148, 72 Cal. Rptr. 819 (1968); *Barcelon v. Cortese*, 263 Cal. App. 2d 517, 69 Cal. Rptr. 657 (1968); *Rosenbaum v. Rosenbaum*, 257 Cal. App. 2d 193, 64 Cal. Rptr. 632 (1967); *William E. Doud & Co. v. Smith*, 256 Cal. App. 2d 552, 64 Cal. Rptr. 222 (1967); *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966); *Preston v. Carnation Co.*, 196 Cal. App. 2d 43, 16 Cal. Rptr. 240 (1961); *King v. Tilden Park Estates*, 156 Cal. App. 2d 824, 320 P.2d 109 (1958); *Augustine v. Trucco*, 124 Cal. App. 2d 229, 268 P.2d 780 (1954).

78. See *William E. Doud & Co. v. Smith*, 256 Cal. App. 2d 552, 64 Cal. Rptr. 222 (1967); *Allen v. Powell*, 248 Cal. App. 2d 502, 56 Cal. Rptr. 715 (1967); *Preston v. Carnation Co.*, 196 Cal. App. 2d 43, 16 Cal. Rptr. 240 (1961); *King v. Tilden Park Estates*, 156 Cal. App. 2d 824, 320 P.2d 109 (1958); *Augustine v. Trucco*, 124 Cal. App. 2d 229, 268 P.2d 780 (1954).

79. See *Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972); *Osborne v. Huntington Beach Union High School Dist.*, 5 Cal. App. 3d 510, 85 Cal. Rptr. 793 (1970); *Rosenbaum v. Rosenbaum*, 257 Cal. App. 2d 193, 64 Cal. Rptr. 632 (1967); *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966); *King v. Tilden Park Estates*, 156 Cal. App. 2d 824, 320 P.2d 109 (1958); *Augustine v. Trucco*, 124 Cal. App. 2d 229, 268 P.2d 780 (1954).

80. See *Osborne v. Huntington Beach Union High School Dist.*, 5 Cal. App. 3d 510, 85 Cal. Rptr. 793 (1970).

81. See note 7 & accompanying text *infra*.

82. 124 Cal. App. 2d 229, 268 P.2d 780 (1954).

83. 156 Cal. App. 2d 824, 320 P.2d 109 (1958).

reasoning regarding the use of estoppel. *Augustine* involved an action in four counts to recover a broker's commission: contract, tortious interference, common count for labor and services, and common count for money had and received. The court affirmed a judgment of dismissal after sustaining the defendant's objection to the introduction of evidence.⁸⁴

The defendant gave the broker an exclusive listing to sell land for a 5 percent commission. After the expiration of the listing, the broker got an oral extension along with an agreement to reduce the price. He procured a ready, willing and able buyer, but the defendant postponed the sale. Eventually, he sold to the same buyer through a broker who had been working for the plaintiff at the time of the original listing.⁸⁵

King involved an action in three counts: contract, quantum meruit and expenses incurred. A judgment of nonsuit was affirmed on appeal.⁸⁶

The broker alleged an oral agreement with the head of a real estate syndicate to find a buyer for a large tract of land in return for a 10 percent commission. The broker introduced the buyer and seller and participated in extensive negotiations. The buyer orally agreed to pay the broker, but the details of the compensation were never concluded. After the sale was completed, both the seller and buyer denied the existence of a contract with the broker and refused to pay him.⁸⁷

In both *Augustine* and *King*, the courts included extensive discussions of estoppel to assert subsection 5. The reasoning in each case was more or less the same. The *Augustine* court stated:

The fact that a broker, acting under an oral contract of employment, renders services to an owner in an effort to find a buyer furnishes no basis for an estoppel of the owner to rely upon the statute of frauds.⁸⁸

The *King* court emphasized:

It has long been held in this state that a real estate broker is presumed to know that contracts for real estate commissions are invalid and unenforceable unless put in writing.⁸⁹

Nevertheless, *Augustine* and *King* should not be relied upon as authority for the notion that estoppel cannot be used against subsection 5. First, in neither case did the broker allege actual fraud. Both cases

84. 124 Cal. App. 2d at 234, 268 P.2d at 783.

85. *Id.* at 233-35, 268 P.2d at 783-84.

86. 156 Cal. App. 2d at 825-26, 320 P.2d at 110.

87. *Id.* at 826-28, 320 P.2d at 110-12.

88. 124 Cal. App. 2d at 242, 268 P.2d at 788.

89. 156 Cal. App. 2d at 830, 320 P.2d at 113.

suggested a misunderstanding between broker, buyer and seller rather than a promise made with no intention of performance. Therefore, these cases say nothing about the use of equitable estoppel in cases of actual fraud.

Furthermore, though *Augustine* was decided four years after *Monarco* and *King* four years after *Augustine*, neither case mentions *Monarco*. Indeed, both cases quote with approval the outdated statement of the estoppel doctrine from the first edition of *California Jurisprudence*:

Equity is bound by the statute of frauds, and, in general, will give relief against it only in two classes of cases; first, where to allow the statute to be set up would be to secure to the party relying upon it the fruits of actual fraud; and second, where to allow the statute to be set up would place the party resisting it in an inequitable position, it appearing further that there is evidence just as good as a writing of the agreement between the parties. To create an estoppel to assert the statute, the party relying on it must be able to show clearly, not only the terms of the contract, but also such acts and conduct of the opposite party as amount to a representation that he will not avail himself of the statute to escape his agreement, and, further, that the party asserting the estoppel has, in reliance on such representation and in pursuance of the contract, so far altered his position as to incur an unjust and unconscionable injury and loss, if the statute be allowed to be set up. If no such loss or injury is shown the reason for the estoppel fails. Changes in the position of a party, not made as a necessary consequence of an oral contract within the statute, and not induced by or known to the opposite party when the contract was made, do not estop the latter from setting up the statute.⁹⁰

The result of ignoring the supreme court's pronouncement of equitable estoppel in *Monarco* in favor of the *California Jurisprudence* statement is twofold: first, the courts failed to recognize that the representation of the defendant need not concern the application of the statute itself; second, and more important, neither case considered the possibility of estoppel based on the test of unjust enrichment.⁹¹ Although it is arguable that the unconscionable injury test is precluded by the broker's knowledge that an employment contract must be in writing to be enforceable,⁹² it seems clear that the broker's knowledge

90. 12 CAL. JUR. *Statute of Frauds* § 103 (1923), quoted in 156 Cal. App. 2d at 831, 320 P.2d at 113-14, and 124 Cal. App. 2d at 241 n.2, 268 P.2d at 788 n.2.

91. Since *Monarco* precludes the unjust enrichment test for estoppel where quantum meruit is an adequate remedy, estoppel is especially needed by real estate brokers. The courts have consistently denied brokers relief in quantum meruit for services rendered under an oral employment contract. See cases cited notes 50, 69, 78 *supra*. See generally 12 AM. JUR. 2d *Brokers* § 53 (1964); Annot., 41 A.L.R.2d 905 (1955 & Supp. 1969).

92. See text accompanying notes 140-42 *infra*.

of the statute of frauds is irrelevant to the unjust enrichment test. A defendant may be unjustly enriched regardless of the reasonableness of a broker's reliance on an oral promise to pay a commission.

The opinion in *Jaffe v. Albertson Co.*,⁹³ while denying on the facts the use of estoppel to assert subsection 5, at least recognizes the unjust enrichment test stated in *Monarco*.⁹⁴ The broker sued the seller of a parcel of real estate for breach of an oral employment contract and for conspiracy to interfere tortiously with his rights. A directed verdict for the defendant was affirmed with respect to the contract cause of action.⁹⁵

The factual situation in *Jaffe* is complex. Briefly, the broker was responsible for introducing a prospective buyer to the seller of a ranch, priced around \$30 million. The seller promised to pay a commission for the broker's services. Extensive negotiations were conducted, but a sale was never consummated. Eventually, the seller ended the negotiations, claiming he had arranged to sell to another party.⁹⁶

Unlike *Augustine* and *King*, *Jaffe* gave careful consideration to the *Monarco* case, discussing both tests for estoppel. Unjust enrichment was determined not to be a ground for an equitable estoppel in this case because the transaction was never consummated. Thus, the seller was not enriched through the broker's efforts.⁹⁷ This holding suggests that if the sale had gone through to the party introduced by the broker, then the seller would have been unjustly enriched, and an estoppel would have been found.

The court also held that an estoppel could not be based on the unconscionable injury test because the broker had no right to rely on an oral contract of employment that he knew was unenforceable. In other words, in accepting an oral contract, the broker assumed the risk of not being paid.⁹⁸ This much of the decision is consistent with *Augustine* and *King*. The equities of this long accepted rule will be examined shortly.⁹⁹

More troublesome than the decision in *Jaffe* is the opinion in *Rosenbaum v. Rosenbaum*.¹⁰⁰ While the broker in *Jaffe* did not allege actual fraud, the plaintiff in *Rosenbaum* did claim an oral promise to pay a commission made with no intent to perform. The broker sued on three theories: breach of contract, constructive trust and fraud. A

93. 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966).

94. *Id.* at 604, 53 Cal. Rptr. at 33.

95. *Id.* at 598-600, 618, 53 Cal. Rptr. at 30-31, 42.

96. *Id.* at 596-98, 53 Cal. Rptr. at 28-30.

97. *Id.* at 604, 53 Cal. Rptr. at 33.

98. *Id.* at 604-05, 53 Cal. Rptr. at 33-34.

99. See text accompanying notes 128-42 *infra*.

100. 257 Cal. App. 2d 193, 64 Cal. Rptr. 632 (1967).

judgment for the plaintiff was reversed by the court of appeal.¹⁰¹

The plaintiff was the wife of the defendant at the time the oral contract was made. On several occasions, she had been paid a broker's commission by her husband on oral contracts for services in the sale of real estate. The defendant was the director and president of Visbeek Industrial Park, Inc. and owned 30 percent of the stock. The plaintiff was engaged to sell real estate on behalf of the corporation for a 5 percent commission. She interested the local school board in the property which was the subject of the disputed contract. After negotiations, the school board filed a "friendly" complaint in condemnation to avoid certain taxes; that is, the board "condemned" the property with the consent of the defendant. The broker was never paid.¹⁰²

The holding in this case seems muddled. While the court did not expressly consider the doctrine of equitable estoppel, the opinion cites several cases¹⁰³ concerned with estoppel to assert subsection 5.¹⁰⁴ The bulk of the opinion restates the rule, found in *Augustine, King*, and *Jaffe*, that the plaintiff was a licensed real estate broker and had no right to rely on an oral contract of employment.¹⁰⁵ Nevertheless, as in *Augustine* and *King*, the court gave no consideration to the unjust enrichment test.

The most disturbing aspect of this case is the court's consideration of fraud. The trial court found that the defendant promised to pay a broker's commission without any intent to perform, that this promise was made to induce the plaintiff's reliance, and that she did rely on the promise to her detriment.¹⁰⁶ Such a finding describes a clear case of promissory fraud within the definition of Civil Code section 1572.¹⁰⁷ Nonetheless, the only discussion by the court as to fraud is the following:

Factually and regardless of the reason, the school district filed a complaint in eminent domain against the Corporation property. The school district had the authority to purchase property but did

101. *Id.* at 200, 64 Cal. Rptr. at 637.

102. *Id.* at 195-97, 64 Cal. Rptr. at 634-35.

103. See, e.g., *Pacific S.W. Dev. Corp. v. Western Pac. R.R.*, 47 Cal. 2d 62, 301 P.2d 825 (1956); *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966); *Augustine v. Trucco*, 124 Cal. App. 2d 229, 268 P.2d 780 (1954); *Kroger v. Baur*, 46 Cal. App. 2d 801, 117 P.2d 50 (1941).

104. 257 Cal. App. 2d at 198-99, 64 Cal. Rptr. at 636.

105. She also had no right to rely because she knew the defendant only owned 30% of the corporation's shares and could not compel payment. *Id.* at 199, 64 Cal. Rptr. at 636-37.

106. *Id.* at 197, 64 Cal. Rptr. at 635.

107. See CAL. CIV. CODE § 1572(4) (West 1954). See text accompanying note 4 *supra*.

not exercise the authority. The finding that the plaintiff procured the purchaser is not founded upon the evidence.

Severing the concluded overtone that plaintiff's action is a subterfuge to circumvent the statutory requirement that an employment contract of a real estate broker must be in writing to be enforceable from a cause of action in tort for fraud, plaintiff has failed to sustain her burden of proof of fraud.¹⁰⁸

The train of thought in this confusing statement is difficult to follow. The opinion completely ignores the issue of actual fraud. The court apparently reasons that since plaintiff did not procure a "purchaser," the result of the condemnation did not work a fraud upon her.¹⁰⁹ This conclusion rests on an application of the *Monarco* test for resulting fraud to a tort action based on intentional fraud. Furthermore, the court ignores the possibility of an estoppel or other equitable relief based on actual fraud. Thus, *Rosenbaum* illustrates the danger of citing rules enunciated in older cases without a reasoned analysis as to their general validity or particular applicability to the facts at bar.

The latest California case to consider the application of equitable estoppel to assert subsection 5 is *Keely v. Price*.¹¹⁰ This decision is a clear example of the use of the statute of frauds as a sword rather than a shield.¹¹¹ Through the plaintiff's efforts and expenditures in reliance on an oral contract to sell a parcel of real estate, a sale was consummated, but the broker was never paid.¹¹² Even though the promise to pay a commission was made without any intention of performance, the *Keely* court refused to find a cause of action in tort or in contract through the use of estoppel to assert subsection 5. Not only is the decision inequitable, but also it appears to be a prime example of misinterpretation of the law as articulated by the California Supreme Court.

The plaintiff alleged an estoppel to assert the statute of frauds and relied on *Monarco*. The court held, however, that "the *Monarco* ruling has not been generally applied to oral contracts to pay a real estate broker's commission."¹¹³ In support of this statement, the court cites seven cases, four of which were decided *before Monarco*,¹¹⁴ two of

108. 257 Cal. App. 2d at 200, 64 Cal. Rptr. at 637 (citation omitted).

109. Does the court mean that even if the school board had a written contract with the broker, it could avoid paying the commission by a "friendly" condemnation action?

110. 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972). For a summary of the facts of the case, see text accompanying notes 1-6 *supra*.

111. *Colon v. Tosetti*, 14 Cal. App. 693, 695, 113 P. 365 (1910). "The statute of frauds is for the prevention, not in aid of the perpetration, of fraud. It is to be used as a shield, not as a sword."

112. 27 Cal. App. 3d at 211, 103 Cal. Rptr. at 532.

113. *Id.* at 212, 103 Cal. Rptr. at 533.

114. See *Hicks v. Post*, 154 Cal. 22, 74 P. 695 (1908); *Herzog v. Blatt*, 80 Cal.

which never considered the application of *Monarco*,¹¹⁵ and one of which contained no circumstances of unjust enrichment or allegation of promissory fraud.¹¹⁶ Moreover, the court seems to have misstated the *Monarco* rule:

[A] defendant is precluded from asserting the statute of frauds where the plaintiff would be unconscionably injured or the defendant unjustly enriched and the plaintiff, in reliance on the oral promise, has changed his position.¹¹⁷

The court tries to connect the unjust enrichment test with the requirement of a change in position by the plaintiff in reliance on an oral contract. Actually, as stated previously, the change of position criterion belongs exclusively to the unconscionable injury test.¹¹⁸ The unjust enrichment test considers only the fraud that would result when a defendant is unfairly benefited at a plaintiff's expense. Owing to a confused understanding of *Monarco*, the *Keely* court never reached the issue of unjust enrichment.¹¹⁹

The *Keely* court's discussion of estoppel¹²⁰ is limited largely to distinguishing the instant case from *Le Blond*.¹²¹ In *Le Blond*, the broker released the seller from a written promise to pay a commission in return for an oral promise from the buyer to pay the same commission. In *Keely*, the broker did not release an enforceable written contract in reliance on an oral promise. Instead, he released another unenforceable oral contract. The cases are distinguishable only as to the degree of the injury rather than as to the right of the broker to rely on a promise known to be unenforceable.¹²² A broker should know that an oral

App. 2d 340, 180 P.2d 30 (1947); *White v. Hirschman*, 54 Cal. App. 2d 573, 129 P.2d 430 (1942); *Sweeley v. Gordon*, 47 Cal. App. 2d 381, 118 P.2d 14 (1941).

115. See *King v. Tilden Park Estates*, 156 Cal. App. 2d 824, 320 P.2d 109 (1958); *Augustine v. Trucco*, 124 Cal. App. 2d 229, 268 P.2d 780 (1954).

116. See *Pacific S.W. Dev. Corp. v. Western Pac. R.R.*, 47 Cal. 2d 62, 301 P.2d 825 (1956).

117. 27 Cal. App. 3d at 212, 103 Cal. Rptr. at 533, citing *Monarco v. Lo Greco*, 35 Cal. 2d 62, 220 P.2d 737 (1950).

118. See text accompanying note 33 *supra*.

119. The court ignored *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966).

120. 27 Cal. App. 3d at 212-14, 103 Cal. Rptr. at 533-35.

121. *Le Blond v. Wolfe*, 83 Cal. App. 2d 282, 188 P.2d 278 (1948). See text accompanying notes 71-72 *supra*.

122. *Le Blond* seems relevant only to the issue of how much detriment constitutes an unconscionable injury. No case has considered this problem as to brokers, as the courts have not gotten beyond the "reliance" barrier. Cf. *Goldstein v. McNeil*, 122 Cal. App. 2d 608, 265 P.2d 113 (1954). In *Goldstein* the defendant was estopped to assert the statute of frauds as a defense to a contract to purchase 14 used cars. Unconscionable injury was found due to a missed opportunity to sell the cars at a high market price around the time of the contract instead of during the sharp slump which followed.

A real estate broker also misses opportunities when he expends time in reliance on

employment contract is unenforceable regardless of whether the contract he releases in consideration thereof is written or oral. Moreover, after attempting to distinguish *Le Blond*, the *Keely* court ignored other relevant factors, such as unjust enrichment, expenditures of time and money in reliance on the defendant's promise, and equitable principles against actual fraud.

The court gave little independent thought to the allegation of promissory fraud. The actual fraud in this case was pleaded as a cause of action in tort. The only authority cited by the court in denying the cause of action is one pre-*Monarco* case, *Kroger v. Baur*.¹²³ By a process of bootstrapping, the court also uses *Kroger* as justification for denying the use of equitable estoppel due to actual fraud.

Kroger held that the use of equitable estoppel against subsection 5 was barred by a lack of justifiable reliance on the part of the broker. Therefore, the court reasoned, an action could not lie in tort for deceit, for such an action would "nullify and destroy" the effect of the statute of frauds.¹²⁴ *Keely* cites *Kroger* as precluding the use of intentional fraud as a tort action in a case in which a broker relies on a fraudulent oral promise to pay a commission for services in the sale of real estate. Therefore, the *Keely* court reasoned, the statute of frauds cannot be avoided by using actual fraud as a basis for equitable estoppel. This circular reasoning reflects a pre-*Monarco* understanding of equitable estoppel, since *Kroger* was decided nine years before *Monarco* established unjust enrichment as an independent ground for an equitable estoppel.¹²⁵ Furthermore, both *Kroger* and *Keely* overlooked the ancient equitable principles against using the statute of frauds as a means of perpetrating an actual fraud.¹²⁶

The only possible conclusion to this examination of recent California Court of Appeal decisions is that the courts are in a state of confusion as to the use of equitable estoppel to avoid subsection 5.

Equitable Considerations

Even though a proper interpretation of California case law does not preclude the use of equitable estoppel against subsection 5, brokers face a further obstacle in the courts' traditional hostility to their trade.¹²⁷ Since estoppel is an equitable doctrine, the court must be

an oral contract of employment. See generally *Equitable Estoppel*, *supra* note 24, at 590.

123. 46 Cal. App. 2d 801, 117 P.2d 50 (1941).

124. *Id.* at 803, 117 P.2d at 52. This conclusion is erroneous, as the statute of frauds was never meant to protect intentional fraud. See text accompanying notes 26-27 *supra*.

125. 27 Cal. App. 3d 209, 215, 103 Cal. Rptr. 531, 535 (1972).

126. See text accompanying notes 25-27 *supra*.

127. See text accompanying notes 68-81 *supra*.

convinced of the fairness of a broker's case before he will be granted relief. A careful consideration of the modern real estate business should leave the courts more sympathetic to the broker's position.

Two reasons have been advanced by the courts for denying real estate brokers a cause of action through the use of estoppel. First, the courts reason that public policy requires a strict application of the statute of frauds because real estate transactions are especially vulnerable to fraudulent and multiple claims for services.¹²⁸ Second, they assert that since a broker knows that a contract for employment must be in writing, he has no right to rely on an oral promise of a commission.¹²⁹ These arguments are not as strong as they may seem.

Public Policy

In the name of public policy, real estate brokers face double discrimination. The legislature discriminates against them, for the real estate business is the only occupation where contracts of employment are specifically covered by the statute of frauds.¹³⁰ The courts further discriminate against brokers, for subsection 5 is apparently the only provision of the statute of frauds to which the doctrine of equitable estoppel is not applied. The only justification for this discrimination seems to be the contention that the public needs special protection from brokers because real estate transactions are particularly prone to fraudulent and multiple claims for services.¹³¹

Is this discrimination against brokers really required by public policy? Surely, public policy is as much opposed to a fraud practiced *on* a broker as to a fraud practiced *by* a broker. There seems little doubt that actual, that is, intentional fraud on the part of the employer of a broker should eliminate use of the statute of frauds as a refuge for withholding an earned commission. There is no public policy in encouraging schemes to defraud brokers. As discussed previously, equity has long enforced oral contracts despite the statute of frauds if the defendant entered into the contract with no intention of keeping his part of the bargain.¹³² Why is this equitable rule denied to brokers?

128. See, e.g., *Gorham v. Heiman*, 90 Cal. 346, 27 P. 289 (1891); *Brand v. Mantor* 6 Cal. App. 2d 126, 44 P.2d 390 (1935); *Cowing v. Wofford*, 68 Cal. App. 538, 229 P. 883 (1924).

129. *Pacific S.W. Dev. Corp. v. Western Pac. R.R.*, 47 Cal. 2d 62, 301 P.2d 825 (1956); *Rosenbaum v. Rosenbaum*, 257 Cal. App. 2d 193, 64 Cal. Rptr. 632 (1967); *William E. Doud & Co. v. Smith*, 256 Cal. App. 2d 552, 559, 64 Cal. Rptr. 222, 227 (1967), quoting *Kraemer v. Smith*, 179 Cal. App. 2d 52, 55, 3 Cal. Rptr. 471, 473 (1960); see, e.g., *Osborne v. Huntington Beach Union High School Dist.*, 5 Cal. App. 3d 510, 85 Cal. Rptr. 793 (1970).

130. CAL. CIV. CODE § 1624 (West 1973).

131. See cases cited note 128 *supra*.

132. See text accompanying notes 26-27 *supra*.

Furthermore, public policy does not require a strict application of subsection 5 in cases of resulting fraud, that is, unconscionable injury or unjust enrichment. Other means are available to protect the public adequately from unscrupulous brokers. In the first place, a broker encounters two formidable obstacles of proof in perpetrating a fraud by means of a fabricated oral contract. Not only must he prove the existence of a contract without the benefit of a writing, but he must also prove fraud in order to avoid subsection 5.¹³³ An additional protection, interpleader, could insure against multiple liability in a situation in which several brokers claim the same commission.¹³⁴ Furthermore, modern licensing laws control the qualifications and activities of real estate brokers and salesmen.¹³⁵ New York, in fact, has recognized that licensing laws are sufficient public protection against fraudulent brokers' claims; it has relieved licensed brokers from the coverage of its own statute of frauds provision requiring contracts for services in selling real estate to be in writing.¹³⁶ It would appear, then, that the public is sufficiently protected against unscrupulous brokers to allow brokers equitable protection against dishonest members of the public.

Reliance

If public policy does not dictate discrimination against brokers, the courts are left with the argument that brokers have no right to rely on an oral contract because they know it is unenforceable.¹³⁷ This argument, though persuasive on its face and sanctified by repetition, will not withstand reflection concerning the realities of the real estate business.

133. See text accompanying notes 24-36 *supra*.

134. See CAL. CODE CIV. PROC. §§ 386-86.5 (West 1954); *cf.* *Krassner v. Veneman*, 206 Cal. App. 2d 299, 23 Cal. Rptr. 673 (1962).

135. See CAL. BUS. & PROF. CODE §§ 10150-65 (West 1964). California did not begin to regulate real estate brokers and salesmen through licensing until 1917. Cal. Stat. 1917, ch. 758, at 1579.

136. See N.Y. GEN. OB. LAW § 5-701 (McKinney 1964); N.Y. LAW REVISION COMM., Report No. 65(G), at 615 (1949). *But cf.* RESTATEMENT (SECOND) OF CONTRACTS § 217A, comment c, illus. 3 (Tent. Draft Nos. 1-7, 1973). This illustration seems at first glance to be contrary to the use of equitable estoppel by real estate brokers: "A orally promises to pay B a commission for services in negotiating the sale of a business opportunity, and B finds a purchaser to whom A sells the business opportunity. A statute extends the Statute of Frauds to such promises, and is interpreted to preclude recovery of the reasonable value of such services. The promise is not made enforceable by B's reliance on it." *Id.* However, note that the illustration specifies a seller of a business opportunity. In New York, brokers of business opportunities are unlicensed and subject to the statute of frauds. Two cases are cited as authority for illustration 3, both applying New York law. See *Lee v. St. Joe Paper Co.*, 371 F.2d 797 (2d Cir.), *cert. denied*, 389 U.S. 821 (1967); *Minichiello v. Royal Business Funds Corp.*, 18 N.Y.2d 521, 223 N.E.2d 793, *cert. denied*, 389 U.S. 820 (1966).

137. See cases cited note 129 *supra*.

Before these realities are discussed, it must be re-emphasized that the issue of the broker's right to rely is relevant only to the type of fraud involving unconscionable injury. No expenditure of time and money will amount to an unconscionable injury if the broker was unjustified in relying on his employer's oral promise to pay a commission. On the other hand, justification for reliance is immaterial where actual fraud or unjust enrichment is concerned. Actual fraud will estop the use of the statute of frauds because of the evil intent of the defendant.¹³⁸ Unjust enrichment will estop the defense of the statute because the defendant voluntarily accepted benefits conferred under an oral contract.¹³⁹ Thus, unjust enrichment will support an estoppel where a transaction has been consummated through a broker's efforts under an oral employment contract. Strictly speaking, the right to rely issue is relevant only in cases where there is no actual fraud, the broker expends time and money fulfilling his part of an oral contract of employment, but the transaction is *not* consummated.

Can a broker suffer unconscionable injury in reliance upon an oral employment contract which he knows is required to be in writing? The courts have traditionally responded with an automatic "No." The equities of the brokers' case are complex, however, and merit consideration in light of the practicalities of the modern real estate business.

When subsection 5 was enacted in 1878, the typical seller of land knew little about the real estate business. Such persons could prove easy prey for dishonest brokers. Furthermore, legitimate contracts of employment were normally simple enough to reduce conveniently to writing. Recent brokers' suits on oral employment contracts have involved not the small homeowner or businessman but instead complex deals between corporations, government agencies or investment syndicates.¹⁴⁰ Such parties are as knowledgeable about the statute of frauds as the broker. Furthermore, they are often represented by attorneys.¹⁴¹ The seller, as well as the broker, knows the necessity of a written contract.

Moreover, an independent broker is often at a disadvantage in bargaining for a written contract. True, he may be in a position to demand a writing from a homeowner. Nevertheless, his bargaining power is slight compared with that of a corporation or investment syndicate. If an independent broker demands that a contract of employ-

138. See text accompanying notes 25-27 *supra*.

139. See text accompanying notes 33-36, 59-63, 93-97 *supra*.

140. See, e.g., *Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972); *Rosenbaum v. Rosenbaum*, 257 Cal. App. 2d 193, 64 Cal. Rptr. 632 (1967); *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966); *King v. Tilden Park Estates*, 156 Cal. App. 2d 824, 320 P.2d 109 (1958).

141. See, e.g., *Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531 (1972).

ment be reduced to writing, but the employer procrastinates, the broker can either trust the employer or abandon the chance to earn his living. Thus, because of a disparity in bargaining power, the broker may be a victim rather than a perpetrator of overreaching.

Finally, in large real estate transactions, it is often not feasible for a broker and his employer to reduce a contract to writing. Complex sales are subject to lengthy and detailed bargaining. Often, the parties to a transaction do not know exactly what property will be involved or the terms of the sale until they are well into negotiations.¹⁴² Such practicalities often prevent a broker from demanding a contract of employment that would cover every contingency. Thus, after expending great effort in the negotiation of a complex transaction, the broker may be left with no assurance of receiving his promised commission.

These problems of bargaining power and business usage are not an exhaustive account of the broker's position in equity. To a large degree, the right to rely depends on the facts of each case. These issues are raised merely to direct the courts to a new line of thought with regard to reliance on an oral employment contract. The courts must substitute judgment for the rote application of a threadbare rule.

Conclusion

Neither the California Legislature nor the California Supreme Court has categorically denied the use of equitable estoppel to assert subsection 5. Nevertheless, California Court of Appeal cases, such as *Keely*, have consistently denied the use of equitable estoppel to real estate brokers even in the most blatant situations of actual or resulting fraud. Such decisions ignore the ancient equitable principle against actual fraud and misconstrue the *Monarco* doctrine which established unconscionable injury and unjust enrichment as two distinct grounds for granting relief based on resulting fraud. Though the courts have justified discrimination against the broker for reasons of public policy, the public has other adequate safeguards against unscrupulous brokers. Furthermore, disparity of bargaining power and the practicalities of the modern real estate business often preclude the broker from demanding that every contract for his services be in writing. The courts must realize that allowing a real estate broker to use the doctrine of equitable estoppel to avoid the statute of frauds is not barred by precedent and is mandated by fairness. The defrauded broker is entitled to a cause of action.

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142. See, e.g., *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 53 Cal. Rptr. 25 (1966).

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